No. 83-1117

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM S. LAWSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed as untimely petitioner's appeal from the denial of a motion to set aside his conviction and grant him a new trial.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) dismissing petitioner's appeal as untimely is unreported. The opinion of the district court (Pet. App. B1-B17) denying petitioner's motion to set aside his conviction and for a new trial is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1983. No extension of the time for filing a petition for a writ of certiorari was sought. The petition was filed on January 6, 1984, and it is therefore untimely. See Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted of willful failure to file federal income tax returns for

1978 and 1979, in violation of 26 U.S.C. 7203, and willful supplying of a false and fraudulent withholding certificate to his employer in 1979, in violation of 26 U.S.C. 7205. He appealed to the United States Court of Appeals for the Tenth Circuit, contending that the trial court had erred in denying various pretrial motions and motions for acquittal, in making certain evidentiary rulings, in instructing the jury, and in sentencing him. Petitioner also asserted that the jury's verdict was against the weight of the evidence and contrary to law. The court of appeals rejected all of petitioner's contentions except a claim that the district court had erred in denying petitioner's pretrial motion to inspect and copy jury selection records. The court remanded the case to the district court to allow petitioner's counsel to inspect the relevant documents as permitted by 28 U.S.C. 1867(f) and to file an appropriate motion pursuant to 28 U.S.C. 1867(a) and (d). The court affirmed petitioner's conviction in all other respects. *United States* v. *Lawson*, 670 F.2d 923 (10th Cir. 1982).

2. Pursuant to the court of appeals' decision, petitioner's counsel was permitted to inspect the jury selection records (Pet. App. B2). Thereafter, on May 18, 1982, petitioner moved the district court to set aside his conviction and grant him a new trial in "the division of his residence"[1] on the ground that the district court's jury selection plan did not provide for a fair cross-section of jurors from the entire district and permitted a defendant to be tried in Cheyenne, Wyoming, before a jury that was "drastically different from those drawn elsewhere [in the district]," in violation of petitioner's Sixth Amendment rights (*id.* at B2-B3). In an

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[1]Petitioner apparently resides in the Sheridan division of the district court (see Pet. App. B12). As the district court noted, "[t]he federal courtroom at Sheridan was relinquished by the Administrative Office of the U. S. Courts and demolished by the General Services Administration prior to 1975" (*id.* at B6).

order filed on December 21, 1982, the district court denied petitioner's motion (*id.* at B1-B17).

3. In his petition (Pet. 6-7), petitioner sets forth the following allegations: he lives in Gillette, Wyoming, and his counsel "now and then, resided in Victor, Montana"; the district court and its Clerk's office knew of his counsel's Victor, Montana, address from at least April 21, 1982, and had mailed notices to that address before the hearing on his motion in June 1982; from the time of the hearing through the first part of December 1982, petitioner's counsel from time to time contacted an attorney with an office in Cheyenne, Wyoming, to find out whether the court had ruled and was told that nothing had been filed by the court;[2] the Clerk's office mailed a copy of the district court's order of December 21, 1982, to petitioner's counsel at a former address in Missoula, Montana, and the copy was returned to the Clerk's office undelivered; on January 31, 1983, 41 days after the order was filed, the Clerk's office called petitioner's counsel and told him of the order; and counsel informed the Clerk's office that a notice of appeal would be filed immediately. Petitioner filed a notice of appeal on February 8, 1983 (Pet. App. A2).

4. The court of appeals dismissed petitioner's appeal as untimely (Pet. App. A1-A3).The court pointed out that petitioner had failed to seek an extension of time to file a notice of appeal in the district court and held that his counsel's failure to learn of the entry of the district court's order within the time allowed for an appeal did not excuse the failure to request an extension of time from the district court.

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[2]Petitioner does not give any reason why his counsel never contacted the Clerk's office directly, nor does he explain why, having made periodic third-party inquiries as to the status of his motion from June through early December, petitioner's counsel apparently then ceased any efforts to keep informed of the status of his case.

ARGUMENT

Petitioner argues (Pet. 7-17) that this Court should review the question whether the lack of actual notice of an order tolls the 10-day period for filing a notice of appeal from a final order in a criminal case.[3] Petitioner acknowledges (Pet. 14-15) that there is no conflict among the circuits on this issue. Moreover, petitioner's arguments are squarely foreclosed by Fed. R. App. P. 4(b) and Fed. R. Crim. P. 49(c). Accordingly, this Court's review is not warranted.[4]

1. Fed. R. App. P. 4(b) provides that a notice of appeal by a defendant in a criminal case must be filed within 10 days after entry of the judgment or order to be appealed. Rule 4(b) further provides that the district court may grant a 30-day extension of time for filing a notice of appeal in a criminal case "[u]pon a showing of excusable neglect." The court of appeals may not grant an extension (Fed. R. App. P. 26), and it is settled that the 30-day "grace period" permitted by Rule 4(b) may not be extended. *United States* v. *Hoye*, 548 F.2d 1271, 1273 (6th Cir. 1977); *United States* v. *June*, 503 F.2d 442, 443-444 (8th Cir. 1974). Further, this Court has held that the filing of a notice of appeal within the prescribed time is "mandatory and jurisdictional." *United States* v. *Robinson*, 361 U.S. 220, 224 (1960) (footnote omitted).

Fed. R. Crim. P. 49(c) expressly provides that "[l]ack of notice of the entry [of an order made on a written motion subsequent to arraignment] by the clerk does not affect the

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[3]Petitioner does not contend that he did not receive notice of the court of appeals' decision, nor does he offer any other explanation to justify the untimely filing of the instant petition for a writ of certiorari.

[4]The Court declined to review an identical claim in *James* v. *United States*, cert. denied, 459 U.S. 1044 (1982).

time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure." Rule 4(b) does not include failure of the clerk to provide notice of the entry of a judgment or order as one of several occurrences that tolls the running of the period within which a notice of appeal must be filed. Thus, the rules unequivocally establish that petitioner's notice of appeal was untimely. *United States* v. *Schuchardt*, 685 F.2d 901 (4th Cir. 1982); *Hensley* v. *Chesapeake & O. Ry.*, 651 F.2d 226 (4th Cir. 1981); *Silvia* v. *Laurie*, 594 F.2d 892 (1st Cir. 1979); *In re Morrow*, 502 F.2d 520 (5th Cir. 1974); *Weedon* v. *Gaden*, 419 F.2d 303, 306-308 (D.C. Cir. 1969).

Rule 49(c) was amended in 1966 to eliminate the possibility of an extension of time to appeal beyond the 30-day "excusable neglect" period allowed by Fed. R. App. P. 4(b). As petitioner points out (Pet. 8-9), several cases decided *before* the amendment stood for the proposition that in the event of a delay by the clerk in giving notice of a judgment or order, "the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of entry of the order." *Lohman* v. *United States*, 237 F.2d 645, 646 (6th Cir. 1956); see also *Rosenbloom* v. *United States*, 355 U.S. 80 (1957). But petitioner acknowledges (Pet. 8) that no case has so held since the amendment. Indeed, it is clear from the Notes of the Advisory Committee that the 1966 amendment was intended to overrule the pre-amendment cases. The advisory committee notes on the similar amendment to Rule 77 of the Federal Rules of Civil Procedure, which went into effect in 1948, make the same point. That amendment was expressly intended to overrule this Court's decision in *Hill* v. *Hawes*, 320 U.S. 520 (1944), on which petitioner

relies (Pet. 11).[5] It is thus clear that the court of appeals correctly dismissed petitioner's appeal.

2. To be sure, the result in this case, although plainly required by the applicable rules, may seem harsh. That harshness is mitigated, however, by the clearly frivolous nature of the appeal that petitioner has been foreclosed from pursuing. Petitioner's challenge is to the jury selection plan for the District of Wyoming; specifically, he objects to the fact that, although the plan divides the District into five "divisions," in practice jury trials are held only in the Cheyenne and Casper divisions.[6] Accordingly, residents of the other three divisions are not selected for federal jury duty. Pet. App. B2-B3.

The district court rejected petitioner's challenge in light of the following findings of fact (Pet. App. B6-B8):

> 3. While 28 U.S.C. Section 131 designates Cheyenne, Casper, Lander, Sheridan and Evanston as places of holding Court, there are courtrooms with adequate jury facilities only at Cheyenne and Casper, and those

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[5]Petitioner also relies (Pet. 15-16) on this Court's decision in *Fallen* v. *United States*, 378 U.S. 139 (1964), in which the Court concluded that, in the unique circumstances of that case, petitioner's untimely notice of appeal should be excused. Fallen was unrepresented by counsel (378 U.S. at 142), he was ill (*id.* at 140 n.2), he was "whisked away from the place of trial * * * on the day after he was sentenced, and * * * not permitted to have visitors, nor afforded the opportunity to secure another attorney" (*id.* at 142-143), and it appeared that the notice of appeal he prepared himself failed to reach the Clerk's office in timely fashion only because prisoners' mail pick-ups were limited to twice a week (*id.* at 143). Petitioner's case hardly compares with the unusual combination of special circumstances present in *Fallen*.

[6]There are no statutory divisions within the District of Wyoming (28 U.S.C. 131). The "divisions" for purposes of jury selection are the counties surrounding the places where court is authorized to be held. See 28 U.S.C. 1869(e)(2).

facilities at Casper are old and out-of-date but adequate. The federal courtroom at Sheridan was relinquished by the Administrative Office of the U.S. Courts and demolished by the General Services Administration prior to 1975. The Federal courtroom at Evanston was relinquished by the Administrative Office of the U.S. Courts also. It is now possessed by the U.S. Post Office Department. It has not been used in more than 30 years and has no courtroom furniture in it. The courtroom at Lander is antiquated, without tables and chairs in the jury room. Thus, the only place where jury trials can be held in this District are Cheyenne and Casper. There is now pending before Congress legislation to make Jackson a place of holding court, in order to serve the western part of Wyoming but no courtroom exists there as yet * * *.

4. Over 50% of the jury trials in this District are held in Cheyenne and the balance of them are held in Casper because Cheyenne is the place of the principal office of the Court, where its clerks and records are and where the offices of the United States Attorney, United States Marshal and probation officers are located, and where the great majority of its work must be done, and also because while trials are in progress in Cheyenne, motions, pretrial conferences, arraignments and pleas can be heard during recess periods. * * *

A virtually identical challenge to the practice of holding most jury trials in Madison, Wisconsin, rather than in other "divisions" in the Western District of Wisconsin was rejected in *United States* v. *Raineri*, 670 F.2d 702 (7th Cir.), cert. denied, 459 U.S. 1035 (1982). Petitioner's claim is no more meritorious than the claim in *Rainerí*; in both cases, alternative courtroom facilities were unavailable. 28 U.S.C. (Supp. V) 142 provides that "Court shall be held only at

places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States." In addition, as the district court found (Pet. App. B7-B8), holding jury trials in Cheyenne results in much greater efficiency for the overall administration of the court's business; trials held in Sheridan, which "has little or no air service, no rail service, and is a 6 hour drive from Cheyenne" (*id.* at B9), obviously would have a significant adverse impact on the prompt administration of justice within the district. See *Raineri*, 670 F.2d at 706.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1984

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[7]Petitioner also appears to have argued in the district court that there were certain irregularities in the Clerk's administration of the jury selection plan. The district court's opinion demonstrates that petitioner's challenges were frivolous (Pet. App. B8-B10).

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